82474-6

NO. 36089-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GEORGE KELLEY, as guardian for BB, PB, and NB, minor children,

Appellant,

vs.

CENTENNIAL CONTRACTORS ENTERPRISES, INC.,

Respondents.

OPENING BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

OTHER AUTHORITIES

I. INTRODUCTION

The trial court did not err in granting Centennial's motion to dismiss. Washington courts have clearly held that a child may not bring a separate consortium claim unless the child establishes that it was not feasible to join their claims with their parents' underlying claims.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY OF PARENTS' CLAIMS.

1. Parents Did Not Request an Expedited Track Assignment When Filing Their Lawsuit on March 29, 2004.

Appellants' parents, Phillip and Monica Blackshear, filed a Complaint against Centennial on March 29, 2004 for injuries and damages stemming from Mr. Blackshear being struck by Centennials' steel beam a year earlier on April 7, 2003. CP 10. The Blackshears, then and now, resided in California. CP 6. Therefore, much of the discovery in the case had to take place in that state. CP 6.

Phillip and Monica Blackshear's attorney, Darrell Cochran, had a Track Assignment Request filed on March 29, 2004 requesting the case be given a standard track assignment. CP 15. Plaintiffs did not request an expedited track assignment. CP 15. On March 29, 2004 an Order Setting Case Schedule was issued placing the case on the standard track assignment. CP 17.

2. Mr. Blackshear Already Had One Surgery Prior to Filing Lawsuit and Two Surgeries Prior to the First Trial Date.

In his suit against Centennial, the minor Plaintiffs' father, Phillip Blackshear, claimed injuries to his right knee, right ankle, right foot, low back and right shoulder. CP 6. He was immediately out of work after the accident and throughout the litigation of the parents' claims. CP 55.

As an overview of Mr. Blackshear's injury, he first sought treatment at St. Clare Hospital on April 4, 2003. CP 6. He went on to treat with his primary care physician, Arun Duggal. MD CP 6. Early on in his treatment, Mr. Blackshear had right shoulder surgery on October 7, 2003 by John Casey, MD, Orthopaedic Surgeon, prior to even filing the original lawsuit in March 2004. CP 6-7. After filing the original lawsuit, he had right carpal tunnel surgery on November 22, 2004 with Dr. Casey. CP 7. Mr. Blackshear also underwent back surgery with Benjamin Remington, MD, Neurosurgeon, on February 10, 2005 and September 8, 2005. CP 7.

The original trial date of March 28, 2005 was moved because of court congestion. CP 7. Even though Mr. Blackshear had already undergone one surgery before the lawsuit and had undergone two surgeries prior to the first trial date, Plaintiffs still did not bring a motion to move their case from the standard track assignment to the expedited track assignment. CP 7. It was not until the second appointed trial date of September 6, 2005 had come and gone that

the Plaintiffs finally asked for the trial to be heard September 19, 2005 or a date certain as soon as practicable. CP 7. Trial eventually began on September 12, 2005. CP 7.

3. Respondent Incurred Significant Cost In Defending the Parents' Lawsuit.

Respondent incurred significant cost in defending the lawsuit filed on behalf of Phillip and Monica Blackshear. CP 7. The expenses incurred in defending the lawsuit included obtaining a medical doctor from the state of California who performed an IME in that state and who flew to the state of Washington to testify at trial. CP 7. Numerous other depositions also took place in the state of California, although the children were not deposed, because no claims had been made on their behalf. CP 7.

B. PROCEDURAL HISTORY OF MINORS' CLAIMS.

1. Minor Children Filed Suit 6 Months After Parents' Verdict Claiming it Was Impractical to Join in Parents' Lawsuit, But Did Not Provide Evidence Why it Was not Feasible.

A little over six (6) months after the verdict was rendered in their parents' lawsuit, the minor children of Phillip and Monica Blackshear filed their own Complaint on April 6, 2006. CP 7. Appellants in the present case, the minor children are represented by Darrell Cochran, the same attorney that represented their parents in the original lawsuit. CP 19. They allege they suffered, and continue to suffer, a loss of consortium as a proximate result of Centennial's

negligence against their parents. CP 19. Appellants further assert that it was impractical to include the minor children's claims with the initial claims of their parents. CP 19. Appellants claim in their Amended Complaint that because of the "family's dire need for resolution of Phillip Blackshear, Sr.'s claim, and the continuing deterioration of Phillip's physical health, it was impractical to include the minor plaintiffs' case with the initial claims." CP 19.

2. Minor Plaintiffs List Same Expert Witnesses, Rely on Same Documentary Evidence and Same Medical Causation Issues as Their Parents.

In their lawsuit, the minor Plaintiffs listed essentially the same expert witnesses as were listed in their parents' lawsuit. CP 27, 35. It is also anticipated that the same documentary evidence would be presented at the minor Plaintiffs' trial that was presented at their parents' trial. CP 8. In addition, the minor Plaintiffs only claim general damages and do not plan on presenting any evidence of special damages. CP 44. However, the same medical causation issues would have to be retried in the children's lawsuit at considerable expense if their case is allowed to proceed. CP 8.

3. Trial Court was Not Persuaded Minor Plaintiffs Met Their Burden of Proving It was Not Feasible to Join in Parents' Lawsuit.

On February 21, 2007 this court granted Defendant's motion to dismiss. CP 87-88. The court stated that, "...the *Ueland* case has put the burden on plaintiff to show this infeasibility...I'm not

persuaded they met their burden." VRP 3: 9-11. The court went on to state:

> Mr. Blackshear, the father, never went back to work, so by the time the original lawsuit was filed he'd been out of work for nearly a year. Certainly, the financial hardship issue would have presented itself by that time.

VRP 3:12-16.

The court also reasoned, "But the fact is, is that if you look at it, [the father's] medical condition always was deteriorating, was never getting better." VRP 3:19-21. The court finally stated, "So, there's no facts that I determined that made it apparent to the Blackshear family that they ought to withhold claims of the children." VRP 4:2-4.

III. ARGUMENT

A. STANDARD OF REVIEW

Case law dictates that the appellate court will generally accord great deference to the trial court in reviewing factual issues. 1 Wash. Prac., Methods of Practice Sec. 15.19 (4th Ed.) The appellate court will review factual findings only to determine if they are supported by "substantial evidence." *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270, 281 (1993). Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the declared premise. *In Re Marriage of Monaghan*, 78 Wn.App. 918, 923, 899 P.2d 841, 844 (1995). In this case, Plaintiffs have not met

their burden of proving it was not feasible to join their claims in their parents' lawsuit with "substantial evidence."

B. THE TRIAL COURT DID NOT ERR IN DISMISSING PLAINTIFFS' CASE, SINCE PLAINTIFFS FAILED IN MEETING THEIR BURDEN OF PROVING IT WAS NOT FEASIBLE TO JOIN THEIR CLAIMS WITH THEIR PARENTS' LAWSUIT.

The minor children's claims should have been joined in their injured parents' prior lawsuit. In the case of *Ueland v. Reynolds Metals Company*, 103 Wn.2d 131, 137, 691 P.2d 190 (1984) the court held:

> ... children's claim for loss of parental consortium must be joined with the injured parent's claim whenever feasible. A child may not bring a separate consortium claim unless he or she can show why joinder with the parent's underlying claim was not feasible.

(Emphasis added). The court in *Ueland* expressed concern with the possibility of multiple actions when it stated, "We too are concerned with the possibility of multiple actions." 103 P.2d at 194.

Similarly concerned about multiplicity of actions, the court in *Weitl v. Moes*, 311 N.W.2d 259 (1981) conditioned recognition of the child's cause of action on a requirement that "the child's claim be joined with his injured parent's claims whenever feasible." The court in *Weitl* also held that if a child's consortium claim is brought

separately, the burden will be on the child plaintiff to show why joinder was not feasible. *Weitl* at 270.

In *Huggins v. Sea Ins. Co. Ltd.*, 710 F. Supp. 243 (E.D.Wis.1989), a case with very similar facts to our own, children sued to recover for loss of parental consortium. The United States District Court for the Eastern District of Wisconsin held that under Wisconsin law the children's claims for loss of consortium must be dismissed because the plaintiff's made no showing that joinder of their claims with those of their father was not feasible. 710 F. Supp. at 251. The court relied on such cases as *Ueland* and *Weitel* in rending its decision. The *Huggins* court made clear that one of the main reasons for such a rule is to avoid multiplicitous litigation at page 249:

> Foremost among these considerations is that of preventing multiplicitous litigation. The possibiltity of separate lawsuits brought at different points in time is increased when the claim is one for loss of parental consortium because there could be as many lawsuits as the injured parent has children.

Huggins relied on the same rule Washington follows, which requires joinder or consolidation of a minor's loss of parental consortium claims in the parents' lawsuit, and barred the children's consortium claims, that were commenced after the entry of judgment in their father's case. The present case is similar to *Huggins*, and therefore reiterates the fact that if the Blackshear children cannot

meet their burden of proving that it was not feasible to join their claims in their parents' underlying lawsuit, like the *Huggins* children, those claims must be dismissed.

Appellants have not met their burden of proof according to *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 691 P.2d 190 (1984), since they have provided no admissible evidence as to why joinder was not feasible. Rather, the admissible evidence proves it was feasible for the minor children to join their claims with their parents' lawsuit. The Declaration of Phillip Blackshear does not explain why joinder was not feasible and no other admissible evidence has been presented by Appellants. Therefore, this Court has no choice but to affirm the trial court's order granting Centennial's motion to dismiss.

1. Joinder was Feasible, Because the Fathers' Severe Injuries Were Certainly Known Even Before the Lawsuit was Filed.

As noted above in the facts section, the father's severe injuries were certainly known even before the parents' lawsuit was filed. It is disengenous for Appellants to state that it was only on April 6, 2005 that they "knew and finally understood their relationship with their father was forever affected." They were immediately aware of severe injuries as of the date of his accident on April 7, 2003, and he had already had one major surgery before the lawsuit was even filed on March 29, 2004. Moreover, the father underwent two more surgeries even before the first trial date.

Appellants gloss over these facts in their opening brief and try to confuse the court by focusing only on the last surgery. It is clear, however, from the facts that the father's injuries were severe from the beginning and always getting worse and not better. It was certainly feasible for the children to join their claims with their parents' lawsuit from the beginning, since their father was already severely injured before the parents' lawsuit was even filed.

Finally, the continuing deterioration of Phillip Blackshear, Sr.'s physical health is irrelevant to the feasibility of joining the children's claims with their parents' lawsuit. As noted above, Mr. Blackshear's condition was already deteriorating when his lawsuit began. Most importantly, the condition of their father, whether deteriorating or not, is just as relevant to the children's claims as to the father's claims.

2. Joinder was Feasible Since the Children Would Have Had Ample Opportunity to Move Their Case Along Within Their Parents' Lawsuit.

The family's dire need for resolution of Phillip Blackshear, Sr.'s claim is disingenuous, because they never requested this case be placed on an expedited track. If Plaintiffs were truly in a hurry, they had ample opportunity to try and move this case along. Moreover, joining the children in the parents' lawsuit would not have delayed the trial. Plaintiff would have been given the same trial date based on its standard track request, regardless of whether the children's claims would have been part of the underlying lawsuit.

3. Financial Harship is a Red Herring and Did Not Make it Unfeasible to Join in the Parents' Lawsuit.

Appellants' argument that financial hardship made it unfeasible to join the children's claims is illogical. Appellants agree with Respondent that they intended to call essentially the same expert witnesses as were listed in their parents' lawsuit. Appellants also agree with Respondent that the same documentary evidence would be presented at the children's trial that was presented at their parents' trial. Additionally, Appellants agree that discovery on the children's claims would have been minimal since they are only claiming general damages. Appellants also agree that the same medical history of their father would have been presented, and the same witnesses would have been called, even if the children's claims had been joined. Furthermore, and perplexing, is that Appellants agree that the same medical causation issues will have to be relitigated in this case at considerable expense. Therefore, it would have been more cost effective and taken less time and resources for the minor children to have included their claims with their parents' lawsuit.

There is no reason why it would have been unfeasible to bring the minor children's claims in their parents' lawsuit. What is unfeasible is for Respondent to be required to relitigate the same issues, with the same witnesses, in the same format of trial proceedings. It is simply unfair to force Respondent to try

essentially the same case twice with respect to the significant medical issues surrounding Mr. Blackshear's alleged injury claims.

C. *THE TRIAL COURT DID NOT RENDER A DECISION ON A MOOT ISSUE.*

Appellants are merely attempting to mislead this Court as to the issue in this matter when they argue the issue in this case is moot. Washington law in this area is clear. As stated earlier, the *Ueland v. Reynolds Metals Company*, 103 Wn.2d 131, 691 P.2d 190 (1984) court held the following at page 137:

> We too hold that the children's claims for loss of parental consortium must be joined with the injured parent's claim whenever feasible. A child may not bring a separate consortium claim unless he or she can show why joinder with the parent's underlying claim was not feasible. (Emphasis added).

This is not a moot issue as Appellants argue. Just as a Plaintiff waives their right to bring a lawsuit if they fail to file within the statute of limitations, a minor Plaintiff too waives his/her right to bring a lawsuit if he/she fails to file their claim for consortium with their parent's underlying lawsuit if feasible to do so.

Contrary to Appellants' assertion that case law lends support to their position that this issue is moot, they rely on Federal or out of state cases, which do not control the present case. First, Appellants cite *Barber v. Cincinnati Bengals, Inc.*, 41 P.3d 553 (9th Cir. 1994). Even if the court finds this Federal case persuasive, it does not

discount dismissal in this case. The United States Court of Appeals in that case simply held that the District court's dismissal of the children's consortium claims for failure to join in the underlying lawsuit without proving unfeasibility was wrong because the children still had the ability to join their mother's underlying lawsuit, which had not yet been decided. *Barber*, 41 P.3d at 557.

The *Hibpshman v. Prudroe Bay Supply, Inc.*, 734 P.2d 991 (Alaska 1987) case is also not controlling. However, even if the court finds it persuasive, the facts are different than in our case. In *Hibpshman*, the Alaska Supreme Court held that the superior court's dismissal of the minor children's claims for loss of parental consortium was reversed and the case remanded to the superior court with instructions to consolidate the children's claims with those of their parents. Again, because the parents' lawsuit was still ongoing, of course the children were free to consolidate their claims in the parents' lawsuit, as the Blackshear children had the option to do in their parents' underlying case.

The rule followed by Washington under *Ueland* is clear. There is no issue of mootness as to the issue of joinder as Appellants tries to assert. Appellants, alone, had the decision of whether to join their claims in the underlying lawsuit.

IV. CONCLUSION

Our courts have clearly held that a child may not bring a separate consortium claim unless the child can establish that it was not feasible to join their claims with the parents' underlying claims.

There is no reason why it was not "feasible" to join the claims of the children in the prior lawsuit. Therefore, Respondent Centennial respectfully requests this Court affirm the trial court's order granting Centennial's motion to dismiss.

Respectfully submitted this 19th day of December, 2007.

MURRAY, DUNHAM & MURRAY

By: _____

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CERTIFICATE OF SERVICE

I, Tammy Bolte, hereby declare under the penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

I certify that on the 19th day of December, 2007, I caused a true and correct copy of Respondent's Opening Brief to be served on the following via legal messenger:

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